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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States District Judge Edward W. Nottingham, as to call for an exercise of the Supreme Court's power of supervision.

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LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Geana J. Dunkin and her attorney, David L. Smith, hereby petition the Supreme Court of the United States to issue a writ of certiorari to review whether the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has

sanctioned such a departure by United States District Judge Edward W. Nottingham, as to call for an exercise of the Supreme Court's power of supervision.

OPINIONS BELOW

Reference is hereby made to the order issued by the Tenth Circuit on February 11, 1993, and to the order announced by United States District Judge Edward W. Nottingham on February 17, 1994. These orders, as well as the order issued by the Tenth Circuit on March 17, 1993, are included in the appendix to this petition at pages 1a-26a.

JURISDICTION

On February 11, 1993, the Tenth Circuit issued its unpublished order dismissing for lack of jurisdiction Ms. Dunkin's and Mr. Smith's appeals of Judge Nottingham's (July 9, July 16, December 3 and December 10, 1992) orders imposing

immediately payable monetary sanctions of $6,412.18 against Mr. Smith; imposing additional monetary sanctions against Mr. Smith for filing alleged frivolous appeals of Judge Nottingham's sanctions orders; and remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the alleged frivolous appeals. The Tenth Circuit subsequently denied Ms. Dunkin's and Mr. Smith's petition for rehearing and suggestion for rehearing en banc.

On February 17, 1994, Judge Nottingham announced his order imposing immediately payable monetary sanctions of $18,085.83 against Mr. Smith pursuant to the Tenth Circuit's February 11, 1993 order. The statutory provisions believed to confer on the Supreme Court jurisdiction to review these orders by

writ of certiorari are 28 U.S.C. §§ 1254(1) and 1651(a).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Ms. Dunkin is a 46-year-old female citizen of the United States who was employed by Respondent Louisiana-Pacific Corporation from May 28, 1985 through May 17, 1991. During this period, Ms. Dunkin performed her job in an outstanding manner, as evidenced by the performance reviews of her supervisors, and by her promotion to the position of Personnel Director of the plants at Kremmling and Walden, Colorado, and Saratoga, Wyoming. Both before and after Ms. Dunkin's

promotion, numerous comments were made by Respondents James Beldin, Dan Dilworth and Douglas Eddins demonstrating a bias against over-forty, female and/or disabled employees, and against employees who filed worker's compensation claims.

Between October of 1990 and February 4, 1991, Ms. Dunkin suffered approximately twelve asthma attacks at work, and began receiving disability benefits in accordance with company policy. On February 25, 1991, Ms. Dunkin's initial treating physician, Dr. Gloria Zibilich, filled out and returned to the employer the form applicable to an employee with an occupational illness or injury. On February 28, 1991, Ms. Dunkin's attorney filed a worker's compensation claim on her behalf with the Colorado Department of Labor because of her employer's refusal to do so. On

March 14, 1991, Carol Jacobson, the Salaried Payroll Administrator at Hayden Lake, Idaho wrote Ms. Dunkin a letter threatening to "discontinue" her disability benefits if she did not have her treating physician fill out and return the forms applicable to an employee with a nonoccupational illness or injury. On March 27, 1991, Ms. Dunkin wrote back to Ms. Jacobson advising her that the forms she had sent were not appropriate to Ms. Dunkin's circumstances, which involved an occupational illness caused by chemicals in the work environment, and offering to give the forms applicable to an employee with an occupational illness or injury to her doctors for completion if Ms. Jacobson would send those forms to her. On April 2, 1991, Ms. Jacobson wrote back to Ms. Dunkin terminating her disability

benefits effective April 1, 1991, in violation of company policy requiring continuation of salaried employee disability benefits until worker's compensation benefits become available, and enclosing the forms applicable to an employee with an occupational illness or injury.

In stark contrast to this situation, none of the more than 258 under-40 male employees at the Kremmling, Montrose or Walden, Colorado plants receiving disability benefits or worker's compensation benefits in 1988, 1989, 1990 or 1991 had their benefits terminated in violation of company policy. On May 17, 1991, Ms. Dunkin wrote a letter to Mr. Beldin resigning from her employment because of Respondents' illegal age, sex and/or handicap discrimination and/or retaliation against her, and because of

Respondents' retaliation against her for filing and pursuing a worker's compensation claim.

With reasonable accommodation, Ms. Dunkin could have continued to perform most of her job duties as Personnel Director in spite of her handicap; but no good faith effort was made to move her to a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Ms. Dunkin could not continue to survive economically after her disability benefits were terminated, and she was compelled to resign from her employment in order to collect the contributions made on her behalf to the company retirement program.

After Ms. Dunkin resigned from her employment, most of her job duties as Personnel Director were assigned to two males: Don Meyers at the Kremmling

plant, and David Johnson at the Walden plant. Juan Maestas, the male Personnel Director at the Montrose plant, was also assigned some of Ms. Dunkin's job duties.

On May 29, 1991, Mr. Beldin wrote Ms. Dunkin a letter purporting to offer to reinstate her and to accommodate her handicap; but no concrete proposal was made to move her to a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Mr. Beldin's letter to Ms. Dunkin was nothing more than an attempted coverup of Respondents' discriminatory and retaliatory motive to make working conditions so difficult that a reasonable person in Ms. Dunkin's position would feel compelled to resign.

On May 31, 1991, Ms. Dunkin wrote Mr. Beldin a second letter of resignation, identical to the first, in

response to his insincere offer and attempted coverup. Mr. Maestas later told Ms. Dunkin that Mr. Beldin was "angry beyond description" at her for pursuing her worker's compensation claim, and that Mr. Beldin said that he would "never again hire a female personnel director."

B. PROCEDURAL BACKGROUND

On February 7, 1992, Ms. Dunkin filed suit in the United States District Court for the District of Colorado, United States District Judge Edward W. Nottingham presiding. Ms. Dunkin's complaint charged the Respondents with intentional age discrimination and retaliation under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; intentional sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

2000e et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a; intentional age and sex discrimination and retaliation under the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and intentional retaliation for filing and pursuing her worker's compensation claim under Colorado common law. Subject matter jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343 and 1367.

On July 9, 1992, Judge Nottingham held a hearing and granted the motions for protective orders filed by the Respondents;[1] imposed sanctions

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[1]Judge Nottingham granted Respondents' motions for protective orders even though they failed to show "good cause" for a protective order under Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, the Respondents failed to

(including harsh verbal reprimands) against Ms. Dunkin and/or her attorney, David L. Smith (a sole practitioner in Denver, Colorado), for refusing to sign the confidentiality agreement proposed by the Respondents with respect to virtually all of the documents to be produced to Ms. Dunkin in the case;[2] and required Ms. Dunkin to obtain approval for her depositions and other discovery requests from a United States Magistrate Judge as a condition precedent to conducting any

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show that the documents and information sought to be protected were subject to any confidential information privilege.

[2]The confidentiality agreement proposed by the Respondents was exceedingly broad in scope, covering virtually every document to be produced to Ms. Dunkin in the case, as well as all information obtained from such documents; and requiring her to follow burdensome and expensive procedures for use of the documents and information at depositions or at trial.

discovery in the case.[3] In connection with the sanctions imposed against Ms. Dunkin and/or Mr. Smith, Judge Nottingham ordered the Respondents to file their applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications for attorney fees.

On July 16, 1992, Judge Nottingham held a hearing on Respondents' applications for attorney fees, and awarded attorney fees of $4,060.00 against Mr. Smith only; required Mr. Smith to pay this amount to the Respondents on or before July 27, 1992;

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[3]Under the stipulated scheduling and discovery order signed by the attorneys for the parties and by Judge Nottingham, and entered by Judge Nottingham on May 28, 1992, discovery, including the depositions of the parties and more than 38 witnesses, was to be completed by September 25, 1992.

and denied Mr. Smith's request for a stay of execution on the award of attorney fees pending appeal. Judge Nottingham then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information," and a written special order of reference to United States Magistrate Judge imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in the case. Throughout Judge Nottingham's verbal and written orders, Mr. Smith was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and Mr. Smith subsequently appealed Judge Nottingham's

(July 9 and July 16, 1992) orders to the Tenth Circuit.

On December 3, 1992, Judge Nottingham held a hearing and denied Ms. Dunkin's motion for reconsideration of the ruling made by United States Magistrate Judge Bruce D. Pringle on October 29, 1992, and imposed sanctions (including harsh verbal reprimands) against Ms. Dunkin and/or Mr. Smith under Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37 for filing the motion for reconsideration. In his (October 29, 1992) ruling, Magistrate Judge Pringle sustained the objection of Respondents' attorney, Cecil R. Hedger, to deposition questions asked by Mr. Smith relating to discrimination against Hispanic employees of Respondent Louisiana-Pacific

Corporation. At the (December 3, 1992) hearing, Judge Nottingham acknowledged that discrimination against Hispanic employees of Respondent Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b); but found and concluded that Magistrate Judge Pringle's (October 29, 1992) ruling was nevertheless not "clearly erroneous" or "contrary to law" under Local Rule 602C, which includes a provision requiring attorney fees to be assessed against the losing party on a motion for reconsideration of a magistrate's ruling. When Mr. Smith argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this

situation, and ordered the Respondents to file their applications for attorney fees and costs against Mr. Smith only by December 8, 1992.

On December 10, 1992, Judge Nottingham held a hearing on Respondents' applications for attorney fees and costs, and awarded attorney fees and costs of $1,870.93 against Mr. Smith for filing and pursuing the motion for reconsideration of Magistrate Judge Pringle's (October 29, 1992) ruling; required Mr. Smith to pay this amount to the Respondents on or before December 16, 1992; and denied Mr. Smith's request for a stay of execution on the award of attorney fees and costs pending appeal. Throughout Judge Nottingham's orders, Mr. Smith was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and Mr. Smith

subsequently appealed Judge Nottingham's (December 3 and December 10, 1992) orders to the Tenth Circuit.

On February 11, 1993, the Tenth Circuit issued its unpublished order dismissing for lack of jurisdiction Ms. Dunkin's and Mr. Smith's appeals of Judge Nottingham's (July 9, July 16, December 3 and December 10, 1992) sanctions orders; imposing additional monetary sanctions against Mr. Smith only for filing alleged frivolous appeals of Judge Nottingham's sanctions orders; and remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each Respondent for defending the alleged frivolous appeals. The Tenth Circuit subsequently denied Ms. Dunkin's and Mr. Smith's petition for rehearing and suggestion for rehearing en banc.

On July 20, 1993, Judge Nottingham lifted the stay of the case that had been in effect since December 23, 1992 and denied Ms. Dunkin's (December 15, 1992) motion for Judge Nottingham to disqualify himself from the case pursuant to 28 U.S.C. § 455(a). In her motion to disqualify, Ms. Dunkin argued that "what is apparent from a review of the record in this case is that while no legal or factual basis existed for imposing sanctions against the plaintiff and plaintiff's attorney, Judge Nottingham nevertheless did so over plaintiff's objections, while refusing to impose sanctions against the defendants and defendants' attorney for refusing to obey Judge Nottingham's previous orders to produce . . . the documents requested by the plaintiff, and refusing to permit the plaintiff to take the depositions of

witnesses with knowledge relevant to the case;" that "as the result of this situation, the plaintiff has been deprived of her right to pursue her lawsuit (including her right to defend against defendants' promised summary judgment motion) in accordance with the intent of Congress in passing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991;" that "Judge Nottingham has exceeded his jurisdiction and abused his power and discretion, in violation of Article III and the due process clause of the Fifth Amendment to the United States Constitution, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 1;" and that "it is therefore clear that Judge

Nottingham's impartiality might reasonably be questioned in this case." Judge Nottingham denied Ms. Dunkin's motion to disqualify without addressing the merits of the motion or giving any reasons for denying it.

On July 29, 1993, Judge Nottingham held a hearing and addressed the following comments to Ms. Dunkin, who made the following response:

> THE COURT: Now, Ms. Dunkin, let me address you directly. This case is going to be tried and/or disposed of on its merits. I think that you are being very ill served by your attorney, Mr. Smith, and I want to advise you of that on the record. You've chosen this attorney and it's my view that he is not competently representing you.
>
> If you wish to have the Court appoint an attorney or if you wish to retain another attorney, I will permit that. You are entitled to the appointment--well, you're not entitled, but the Court is willing to appoint an attorney under the provisions of Tenth Circuit case law to represent you in this case. It is your choice, and if you choose to

proceed with Mr. Smith, you won't be in a position later on to complain to the Court that your case was not properly tried.

Do you understand that?

MS. DUNKIN: (No audible response.)

THE COURT: I didn't hear you.

MS DUNKIN: Yes.

THE COURT: All right. Court's in recess.

(Whereupon, at 6:37 a.m., the hearing was concluded.)

On November 29, 1993, a three-judge disciplinary panel of the Tenth Circuit issued its disciplinary order finding and concluding that Mr. Smith had filed frivolous appeals in four civil rights cases (including the Dunkin case) originally filed in the United States District Court for the District of Colorado; and suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him

by the Tenth Circuit and the District Court are paid.[4] See also In re Smith,

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[4]Before issuing its disciplinary order, the disciplinary panel denied Mr. Smith's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. In that request, Mr. Smith said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Mr. Smith after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four

civil rights cases were frivolous, and was unable to present the financial information necessary to show that he is financially unable to pay more than $50,000.00 in totally unwarranted sanctions imposed against him by the Tenth Circuit and the District Court in those cases.

In its disciplinary order, the disciplinary panel refused to redetermine whether the appeals in the four civil rights cases were frivolous, stating that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] However, this refusal was in blatant violation of 10th Cir. R. 36.3, which provides that unpublished orders and judgments have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel; and created an irrebuttable presumption of guilt that deprived Mr. Smith of procedural and substantive due process of law.

In its disciplinary order, the disciplinary panel suspended Mr. Smith from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. The disciplinary panel therefore subjected Mr. Smith to multiple excessive punishments for the same conduct.

10 F.3d 723 (10th Cir. 1993). Mr. Smith may apply for reinstatement to the Tenth Circuit Bar "when he can demonstrate that each sanction order of this court and the district court has been satisfied." Id.

On December 8, 1993, Mr. Smith was served with the following recommendation from the Chairman of the Committee on Conduct for the United States District Court for the District of Colorado:

The disciplinary panel's disciplinary order is the subject of a petition for a writ of certiorari filed with the Supreme Court on March 31, 1994 (No. 93-1547). In his petition, Mr. Smith argues that an attorney may not be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits; that an attorney may not be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions; and that a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process.

> The United States District Court and its Committee on Conduct have received notice that you have been suspended from the practice of law before the United States Court of Appeals for the Tenth Circuit in an Original Proceeding, Case No. 93-631 until all sanctions are paid; that suspension is or was to be effective commencing November 29, 1993.
>
> You are hereby notified that pursuant to D.C.COLO.LR 83.6P, simultaneous and identical discipline shall be imposed by the United States District Court for the District of Colorado nunc pro tunc from the date of judgment of the United States Court of Appeals for the Tenth Circuit.
>
> You are further notified that within ten (10) days of receiving this Notice, you may show cause in writing why simultaneous discipline should not have been imposed.

The Committee on Conduct's recommendation is still pending before the District Court's three-judge disciplinary panel.

On February 17, 1994, Judge Nottingham held a hearing and stayed Ms. Dunkin's case "pending resolution of Mr. Smith's status by the Committee on

Conduct;" but did not vacate the March 28, 1994 jury trial date. Judge Nottingham then awarded attorney fees of $17,506.50 and costs of $579.33 against Mr. Smith pursuant to the Tenth Circuit's (February 11, 1993) order remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each Respondent for defending the alleged frivolous appeals of his sanctions orders.

On March 4, 1994, Judge Nottingham held a trial preparation conference at which the following colloquy occurred:

> THE COURT: All right, the matter is here for a trial preparation conference.
>
> Mr. Smith, can you give us, without revealing anything that you shouldn't be revealing, give us any guess as to when the matter will be resolved so that we'll know whether you're in or out of this case?
>
> MR. SMITH: No, Your Honor, I have no further information.

THE COURT: Well, I can't continue, you know, to hold that trial date open. What's your position? I mean, you can't continue at this point, can you? You can't even sign a final pretrial order, or you haven't so far.

MR. SMITH: I would ask for permission to sign at this point. There's been no ruling by a court one way or another as to what my status is, and all I have are some allegations.

THE COURT: And you haven't paid any of the money yet; right?

MR. SMITH: You're speaking of the sanctions in this case?

THE COURT: Right. Well, this case or any other case.

MR. SMITH: No, Your Honor, I am unable to pay any sanctions.

THE COURT: All right. This trial is continued.

Mr. Hedger, I'm assuming that Louisiana-Pacific doesn't object to that. I mean, obviously at some point, the work that you've put into it will come to fruition.

MR. HEDGER: Your Honor, Louisiana-Pacific is not going to interpose an objection to the continuance of this matter, but only to note and remind the Court that on

July the 29th of 1993, this Court was very direct in a personal conversation with Ms. Dunkin--

THE COURT: Right.

MR. HEDGER: --and advised her of her need to obtain new counsel. We are now in the position, Your Honor, of having certain of our witnesses who are retired, and it's getting difficult to round them up and make schedules. We would be most desirous of working with the Court in terms of setting an appropriate schedule.

I don't know yet, the Court set this matter for a three day trial and Mr. Smith, in his position in the pretrial order that he's now represented after four months he's willing to sign, thinks this case is going to be a five day trial. And there's a couple of other type of housekeeping issues that need to be addressed at some point. It doesn't necessarily have to be today, Your Honor.

THE COURT: All right. The Tenth Circuit was pretty clear. I can't understand what our disciplinary committee is having such a problem with. But they work on their own schedule and they work on a volunteer basis. So the matter is continued and as soon as Mr. Smith's status is resolved, we'll figure out where it goes.

> And I intend to brook no further delay, because Ms. Dunkin's been warned clearly. She used to attend these conferences. Where is she, Mr. Smith?
>
> MR. SMITH: She's in school, Your Honor.
>
> THE COURT: I see.

On March 17, 1994, Ms. Dunkin filed her pro se appeal of Judge Nottingham's (February 17, 1994 and March 4, 1994) orders, arguing that Judge Nottingham abused his discretion by staying her civil rights case "pending resolution of Mr. Smith's status by the Committee on Conduct," and by vacating the March 28, 1994 jury trial date. Appellate jurisdiction of the Tenth Circuit is based on 28 U.S.C. § 1292(a)(1).

ARGUMENT

In summary, the Tenth Circuit and Judge Nottingham have imposed immediately payable monetary sanctions of $18,085.83

against Mr. Smith for filing and pursuing alleged frivolous appeals of immediately payable monetary sanctions of $6,412.18 imposed against him by Judge Nottingham. While Mr. Smith's appeals have been deemed "frivolous" because of Tenth Circuit precedent holding that interlocutory sanctions orders are not immediately appealable, a majority of the circuit courts hold that sanctions orders are immediately appealable under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v.

Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the

sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); Westmoreland v. CBS, Inc., 770 F.2d 1168,

1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

Since Mr. Smith's appeals of Judge Nottingham's unwarranted sanctions orders would be permitted by a majority of the circuit courts, he is being required to pay monetary sanctions that he is financially unable to pay for filing and pursuing appeals that are not frivolous, thus depriving him of substantive due process of law. These monetary sanctions are being imposed against Mr. Smith in addition to his being suspended from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid, thus subjecting him to multiple excessive punishments for the same conduct. Despite the complete destruction of Mr. Smith's liberty and

property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, his request for a pre-suspension evidentiary hearing was denied, thus depriving him of procedural due process of law.

Because of the reciprocal discipline provision of the Local Rules of Practice of the United States District Court for the District of Colorado, the Committee on Conduct has made a recommendation to impose identical and simultaneous discipline against Mr. Smith in the District Court. If this recommendation is adopted by the three-judge disciplinary panel of the District Court, Mr. Smith will be subjected to additional excessive punishment for the same conduct.

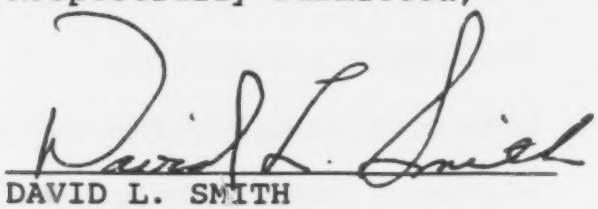
Meanwhile, Ms. Dunkin's civil rights case, including her jury trial date, remains stayed "pending resolution of Mr. Smith's status by the Committee on Conduct," a body of volunteer lawyers that has no authority to determine his status. Indefinitely staying Ms. Dunkin's case on this unwarranted basis while interfering inappropriately with the attorney-client relationship between Mr. Smith and Ms. Dunkin demonstrates clearly the bias of Judge Nottingham, who abused his discretion by refusing to disqualify himself from the case pursuant to 28 U.S.C. § 455(a).

CONCLUSION

The United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States

District Judge Edward W. Nottingham, as to call for an exercise of the Supreme Court's power of supervision.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH

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Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

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HEARING - AWARD OF ATTORNEYS FEES AND PRETRIAL CONFERENCE TRANSCRIPT OF PROCEEDINGS (U.S. District Court for the District of Colorado February 17, 1994) 9a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1230
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees,	)	
	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	
GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1381
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees.	)	
	)	

ORDER

Filed: February 11, 1993

Before Moore, Tacha, and Baldock,
Circuit Judges.

The captioned appeals are jurisdictionally defective because the orders being appealed are not appealable before entry of final judgment.

Both appeals arise out of the same district court action. In appeal no. 92-1230, counsel for plaintiff and plaintiff appeal an order of the district court imposing sanctions on counsel for the plaintiff for violation of discovery orders. The order being appealed in No. 92-1381 imposed attorney fees on the plaintiff's counsel under Local Rule 602C which provides that "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that

attorney's fees will be awarded to the prevailing party on such review." No final judgment has been entered in the underlying action.

The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5.

The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).

Under Fed. R. Civ. P. 38 "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." Braley v. Campbell, 832 F.2d at 1510 (citations omitted).

Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

Appellee's Motion to Strike the

Response of Plaintiff-Appellant and Her Attorney is denied as moot.

These appeals are DISMISSED and the cases REMANDED for a determination of reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel for plaintiff, but not plaintiff. See Braley v. Campbell, 832 F.2d at 1512-1513.

Entered for the Court
ROBERT L. HOECKER, Clerk

By:
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1230
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees,	)	
	)	
_____	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	
GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1381
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees.	)	
	)	

ORDER
Entered March 17, 1993

Before McKay, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for

rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92 N 243
	)	
LOUISIANA-PACIFIC CORPORATION,	)	
	)	
Defendants.	)	

HEARING - AWARD OF ATTORNEYS FEES AND PRETRIAL CONFERENCE TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:11 a.m. on the 17th day of February, 1994, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For David Smith, Esq.: Phillip Figa, Esq.
5251 DTC Parkway
Englewood, CO

For the Defendants: Cecil Hedger, Esq.
Harding & Ogborn
1200 17th St.
#1000
Denver, CO 80202

P R O C E E D I N G S

(At 6:11 a.m. on February 17, 1993, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge, with Mr. Phillip Figa appearing as counsel for Mr. David Smith and Mr. Cecil Hedger appearing as counsel for the defendants, the following proceedings were had:)

THE COURT: Case Number 92 N 243, Dunkin versus Louisiana-Pacific. This matter is before the Court on a document styled Suggestion and Request for Ruling on Attorney Fees, et cetera, et cetera, filed January 20th. Mr. Hedger appears for Louisiana-Pacific and Mr. Figa appears for Attorney David Smith, who represents Geana Dunkin.

I've read the suggestion. I've also read the response to suggestion and the attorneys fees affidavit, and then I finally allowed Mr. Hedger to file a reply, and that reply is likewise on file, and I've read them all, and also there's the problem of final pretrial order and the status of Mr. Smith, which I think is about the only interesting question in this case. Let's take that up first.

Mr. Figa, are you prepared to address whether Mr. Smith can proceed now to represent her or whether I need to enter a stay while other proceedings are pending, or what?

MR. FIGA: Your Honor, I believe that Mr. Smith's status is unclear even to the Committee on Conduct and I have attempted to get a definitive clarification, but discretion being the better part of valor, I have advised my client that I consider

the rule self-executing.

THE COURT: All right. That's the way I look at it, and it was pointed out to me that it's susceptible to different interpretations, and on reviewing it, I see that it is. And I suppose it's something that we need to get straightened out, but at any rate, my view of it is that we cannot proceed until the Committee on Conduct gets this resolved. And I think there are some other pending cases where a similar problem is arising and I think this is--isn't this the view that's being taken by the other judges, or do you know?

MR. FIGA: Your Honor, I understand there's been a stay entered at least in one case by Judge Weinshienk.

THE COURT: Right.

MR. FIGA: There could be more, but that is my understanding, that she has entered a stay; I presume, again, until we

get some clarification generally and with respect to Mr. Smith, that is, generally as to what the rule actually means in general.

THE COURT: All right. I don't think there's going to be any general clarification forthcoming at any time soon. I will stay this case and not proceed with the final pretrial order, but I do want to keep the trial date on the hope that we can get this case tried. It's the first week in April, isn't it?

MR. HEDGER: Your Honor, it's scheduled currently for March 28th.

THE COURT: Oh, is it?

MR. HEDGER: For three days, yes, Your Honor.

THE COURT: All right. That's when I'd like to try it if we can. I don't know when the Committee on Conduct will act, and I guess the proceedings are confidential, so we can't say anything more.

Now, the other question that brings us here this morning is the attorney fees. I've read all of the materials, as I say, and I'm prepared to rule unless somebody else wants to supplement or highlight or something like that.

Mr. Figa?

MR. FIGA: May I briefly supplement, Your Honor?

THE COURT: All right. Yes.

MR. FIGA: The first matter that I want to raise is that a, and I think as this Court is well aware, Mr. Smith has been suspended by the Tenth Circuit for filing four frivolous appeals, three of which relate to this jurisdictional issue. A stay motion petition has been filed with Circuit Justice Ruth Bader Ginsberg in the hopes that the issue of whether a lawyer should be suspended for pursuing a jurisdictional issue, which in at least

four circuits, perhaps a couple more, would not only be non-sanctionable, but would actually be meritorious. We have not heard, and we intend to file a petition for writ of certiorari and I would respectfully request that the Court defer ruling until that issue has been presented to the Supreme Court.

THE COURT: Well, what issue is being presented? You're aware of course he filed a writ to get a review of the Tenth Circuit's order long ago.

MR. FIGA: Yes, Your Honor. The factors to consider when deciding a sanction--

THE COURT: Well, hold on. I don't know whether you're going to answer my question, maybe you are, but what are you seeking cert. on now? The Tenth Circuit's suspension?

MR. FIGA: That's correct, Your Honor.

THE COURT: I see.

MR. FIGA: Your Honor, under White versus General Motors Corporation, factors to consider in the appropriate sanction, including reasonable attorneys fees, is to take into account, and I'm referring to 908 F.2d at 685, among other factors, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances.

My point is simply, Your Honor, that if the U.S. Supreme Court were to either on a stay or on a full petition that the Court would take up whether or not the suspension is appropriate because of filing jurisdictionally defective appeals, which in other circuits would be considered valid, I believe would go to the issue of

the severity of the violation, the degree to which malice or bad faith contributed to the violation, and the risk of chilling the type of litigation involved.

I would also like to just point out that the case upon which the sanction has been ordered, that is, based on the GJB case, Tenth Circuit case, if the Court would look at the holding of that case, that is a case where the court actually did take jurisdiction of an interlocutory appeal by the lawyer and actually reversed the sanctions.

Now, the reason why Mr. Smith is here is because of that court saying that prospectively, we will consider that they lack--that it lacks jurisdiction in the future to take on these matters on an interlocutory basis, but made an exception in this particular case, GJB case, under the theory that since it was the first time

that this apparently occurred before the Tenth Circuit, they would actually invoke jurisdiction.

Your Honor, that's a funny result or reasoning that a court takes jurisdiction in one case and actually with its holding, what it actually did aligns itself with the circuits that do take jurisdiction, the Second, the Seventh, the Ninth and the Eleventh, at least, and--but says no more.

I don't think that the Tenth Circuit really could or should have handled it this way, no matter how compelling the reasons for taking it the first time. Either the court had jurisdiction or it didn't have jurisdiction, no matter how compelling those factors, but nonetheless, the court, with its elastic definition, did take jurisdiction that time. Mr. Smith, in good faith, believed that there were other

circumstances involving him that would have caused perhaps another panel to have taken jurisdiction in those circumstances.

THE COURT: Well, this isn't just a panel of the circuit, some aberrant behavior on the part of the circuit. The circuit has been polled on his request for a rehearing, and nobody wants to rehear it in this circuit. So I don't see this as just getting the wrong panel or the luck of the draw.

MR. FIGA: Your Honor, that may be. There certainly hasn't been an en banc hearing, but clearly all the judges up there have had their shot at hearing it.

My only point is, Your Honor, that this gentleman in this case, in good faith, sought Supreme Court resolution of a genuine split among the--conflict among the circuits. There is no other way that this conflict can really be resolved among

the circuits without a gentleman like Mr. Smith incurring the wrath of a panel of a circuit that has found no jurisdiction.

It seems to me, Your Honor, that a lawyer should have the right to seek a resolution of the conflict among circuits. It's the only way, the only other possible way--

THE COURT: You know, it's really interesting, though, Mr. Figa. I've read Mr. Smith's papers and I think the way to do that is to just say, look, I know you're squarely against me, rule against me so I can seek cert. Mr. Smith didn't do that. I mean, this is the most obtuse pleading that I think I've witnessed.

MR. FIGA: Your Honor, Mr. Smith labors under what Abraham Lincoln said was having a fool for a client. He needed representation. I've stepped in an effort to act as an intermediary in order to help

him. I agree perhaps it could have been better phrased, but I don't think that that should mean that even if he felt that he could sway a panel, that a lawyer who has to run the gauntlet to get to the Supreme Court by incurring monetary sanctions and indeed, in this case, a suspension in an effort to get a resolution of a bona fide split, which the Tenth Circuit itself said in the GJB case was a sharp split among circuits.

Your Honor, that's all I have.

THE COURT: All right. The defendant's motion is granted. I have no doubt about the issues of severity of the violation and malice or bad faith. Mr. Figa, I don't know whether you've had an opportunity to review the full extent of the pleadings that have been filed in this case. Of course I'm focusing only on the issue of whether--the amount of fees to be

awarded as a consequence of the Tenth Circuit's order.

But on the issue of malice and bad faith, I think I can look at other actions that have been taken in the case, and I have no hesitancy to say that Mr. Smith has taken outlandish positions, multiplied this litigation, taken frivolous positions time after time after time since the beginning of this litigation, and I have no doubt in finding malice and bad faith on the facts of this case.

As to the amount of the fees to be awarded, the argument is made that if this is a frivolous appeal, why did it take $17,000.00 to prove it. One would have to review the file in this case to know the answer to that question. Mr. Smith files papers by the ton, and in order to get through those papers, review them, figure out what he's saying and a response to it,

that is what takes so much time.

The reason I know is because I've been through it. I've looked at the papers that he files. In many cases, what he'll do is file something of his with literally hundreds of thousands of pages of xeroxed material that one has to sift through. It's like the typical pro se prisoner case. Many of them are frivolous, but that doesn't mean that it doesn't take time to figure out, first or all, what they're trying to say and, secondly, that they are frivolous. And that's exactly what has happened here. You've got to, first of all, figure out what it is that Mr. Smith is trying to say before you can figure out that sometimes, frequently what he's trying to say is frivolous.

So I'm going to award--I'm not going to award double fees because I don't think that's appropriate in this case, and

I doubt also that the statute really reads that way, or the rule, Federal Rule 38. It says fees and double costs. And I'm going to award attorney fees for pursuing the frivolous appeals--let me back up a second and say one other thing.

On the split of authority among the circuits, as I said in colloquy with counsel, there's a way to handle that, and it wasn't handled that way in this case. In any event, whether there's been a stay with Justice Ginsberg or a request for a stay, and whether there are other circuits that decide the matter to the contrary, I'm in the Tenth Circuit. The Tenth Circuit has pretty clearly given me my marching orders in the order that it filed on February 11th, 1993. So I'm not going to resolve any alleged split in the circuit, although I'll say for the record that in this instance, I think the Tenth Circuit's

position is the only reasonable one, and this case is the prime illustration of it.

If Mr. Smith could make a mockery of these proceedings by turning the circus into the side show by the collateral litigation that he has generated in this case, then there would be no justice in this case. So I'm awarding fees in the amount of $17,506.50. I'm awarding costs in the amount of $579.33.

Now, have the fees and costs from my previous sanctions been paid yet, Mr. Hedger?

MR. HEDGER: No, they have not, Your Honor.

THE COURT: Well, I'll reorder them paid in the for what it's worth category. How an attorney of law can continue to defy the authority of courts is just beyond me.

Court's in recess.

MR. HEDGER: Your Honor, just one

ancillary matter in light of your observation of trying to--I don't need to take up the Court's time. Thank you, Your Honor.

THE COURT: All right.

(6:28 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

February 23, 1994

Federal Reporting Service, Inc.
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(7)

No. 93-1878

IN THE
SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

RICHARD ROE

PETITIONER

V.

LOUISIANA SUPREME COURT, ET AL

RESPONDENT

MOTION TO INTERVENE;
JOINT MOTION FOR PROTECTIVE ORDER;
AND JOINT MOTION TO SHOW CAUSE

Now into court, through undersigned counsel, comes John Doe, who moves to intervene in this case solely for the purpose of keeping his true identity confidential as set forth in this document.

John Doe, joined by Petitioner Richard Roe, moves for a protective order to immediately place Defendants/Respondents' Brief in Opposition and Supporting Documents under seal and further moves that Defendants/Respondents be required to show cause why their documents should not be stricken. The documents at issue improperly reveal the true identity of John Doe who is not a party to this action, whose identity is irrelevant to the subject matter of Roe's petition, and whose identity was revealed to defendants in confidence. Defendants have now willfully and maliciously violated that confidence in an effort to gain advantage in a related case.

10 pp

Roe and Doe submit that Doe's true identity is irrelevant, immaterial and impertinent to the instant litigation. It is also constitutionally protected from disclosure.

This case involves First Amendment challenges by Richard Roe to the constitutionality of defendants' practices of requiring/requesting attorney applicants to utter a religious oath (so help me God) during admissions ceremonies and placing religious references (in the year of our Lord) on law licenses. Intervenor John Doe filed a substantially identical suit against the same defendants in 1991. See Doe v. Louisiana Supreme Court, et al, No. 91-1635 (E.D.La.). Before filing this suit, Petitioner Roe had first attempted to become a plaintiff in the Doe case. The trial court denied Doe's motion for leave to name a new plaintiff and Roe initiated this action. Shortly thereafter, in late 1992, Doe voluntarily dismissed his case.

Like Richard Roe in this case, when John Doe filed suit, he also filed a motion for protective order seeking leave of court to proceed anonymously. While defendants opposed the motion for protective order in the Doe case, the voluntary dismissal occurred before there was any ruling on the motion. It is Doe's position that by electing to voluntarily dismiss his suit, the legal controversy between he and the defendants terminated and he was no longer even arguably compelled by FRCP 10(a) to reveal his name. Doe has never given defendants permission to publicly reveal his identity, which necessarily constitutes revealing certain aspects of Doe's religious beliefs or non-beliefs. While the voluntary

dismissal meant there was no order either granting or denying Doe's motion to proceed anonymously, the absence of an order granting Doe's request is not equivalent to a denial nor is it grounds for defendants to publicly disclose Doe's identity which would not have been allowable even if Doe's motion had been denied. If Doe's motion to proceed anonymously had been denied, he would have had two options: reveal his true identity or face involuntary dismissal. Had Doe's motion been granted, defendants could not have revealed Doe's identity except under conditions set by the trial court or with Doe's permission. Because Doe elected to voluntarily dismiss his suit, the issue was never decided. This fact, however, does not grant defendants power reveal Doe's identity after the suit was dismissed. To allow such a tactic would be to deprive Doe and other plaintiffs of any effective right to even request to proceed anonymously; if their request were denied the "choice" between identifying themselves or terminating litigation is non-existent. The plaintiff who decides to forego litigation will nevertheless be subject to defendants' whim and caprice in deciding whether or not to reveal the plaintiff's name. While Doe did not voluntarily dismiss his case under threat of being identified, he believed the dismissal would render his true identity legally irrelevant. He also believed defendants would keep his true identity confidential.

Any other conclusion than that confidentiality must be maintained in circumstances such as these would require a wasting of judicial and party resources. Will a plaintiff who wishes to

voluntarily dismiss be required to litigate the anonymity question before dismissal to protect confidentiality? Will a plaintiff who voluntarily dismisses have to file a post-dismissal motion to ensure confidentiality? With the requirement of FRCP 10(a) mooted by dismissal, why would a court not order confidentiality? And why would a defendant who is no longer being sued want to make the matter public? This case presents one improper reason which should not be tolerated by this Court.

Defendants' decision to reveal Doe's true identity is seemingly intended only to prejudice Roe's case and to cause harm to Doe. The relevance of Doe's true identity to the Roe case is non-existent. It is true that the Roe and Doe cases are substantially similar in the underlying legal issues presented and that Roe and Doe are/were represented by the same attorney. While these facts provide an interesting historical perspective, they do not contribute to the resolution of the legal issues in Roe's Petition for Certiorari. Revealing the true identity of John Doe does not even contribute historic perspective. It is utterly irrelevant, impertinent and immaterial.

Anticipating that defendants will argue that it is necessary for them to reveal Doe's true identity to establish its relevance, Roe and Doe ask that defendants be first required to demonstrate exactly how and why the true identity of a plaintiff in a factually similar but completely independent case which was voluntarily dismissed in 1992 could ever be relevant. Doe is not a party to this action. If defendants meet this initial burden, Roe and Doe

would further request that resolution of the issues relating to Doe's identity be determined by a person who will have no participation in determining the merits of Roe's Petition for Certiorari. Once Doe's identity is revealed, the prejudicial effect on Roe and Doe will be impossible to undo.

Revealing Doe's true identity is also a constitutional deprivation because defendants have necessarily revealed Doe's religious beliefs by connecting the specific allegations in Doe's original complaint (his religious beliefs or non-beliefs) with a specific person (his true identity). While some judges and justices and others may respect Doe's "different" religious views and the private nature of those views, see, e.g., Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) ("religion is perhaps the quintessentially private matter"), other persons may not (apparently including defendants and/or their attorneys). The point, however, is that it is none of anyone's business that Doe even has different views or what those different views may be! No matter how the state learns of a person's religious views, it can never reveal those views without a compelling interest and even then, only the least restrictive disclosure is permissible. In Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Supreme Court established a two-prong test, holding that before an individual's rights may be infringed, it must be demonstrated that there is a "compelling state interest" which justifies the infringement and "that no alternative forms of regulation would [achieve the compelling state objective] without infringing First

Amendment rights." 374 U.S. at 406-07, 83 S.Ct. at 1795-96. The fact that the state knows Doe's true identity does not render disclosure of that information constitutionally permissible.[1]

Defendants obtained knowledge of Doe's true identity because Doe had initially sought to resolve his dispute informally without resort to the courts. Once suit was filed, it was obvious that the person who had previously corresponded with defendants and John Doe were the same person. At all times, however, Doe had asked that

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[1] Because John Doe's true identity is first and foremost irrelevant, immaterial, and impertinent, detailed consideration of the constitutional arguments should be unnecessary at this time. Defendants, however, are well aware of the constitutional arguments which were raised and argued in both the Roe and Doe cases. If this court is not otherwise inclined to strike defendants' references to Doe's true identity as irrelevant, Doe would request the opportunity to fully brief the constitutional issues. The argument is essentially as follows:

To deny Doe the right to proceed anonymously and to have that anonymity maintained following conclusion of the litigation would be tantamount to compelling Doe to publicly profess and practice his religious beliefs as a condition to his being permitted access to the courts. This has been expressly prohibited by the United States Supreme Court. In Torcasco v. Watkins, 367 U.S. 438, 81 S.Ct. 1680 (1961), a man who had been appointed a Notary Public was refused his commission because he would not declare his belief in the existence of God. In finding the Maryland requirement unconstitutional, the U.S. Supreme Court said,

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

367 U.S. at 495, 81 S.Ct. at 1683-84 (emphasis added; footnotes omitted). The revelation of Doe's identity by defendants was a direct consequence of Doe having filed suit in federal court to vindicate his constitutional rights. Neither the courts nor defendants have the right to disclose or to force Doe to disclose Doe's true identity and thus Doe's religious beliefs. The mere filing of suit in federal court raised constitutional matters to which FRCP 10(a) must defer.

his identity be kept confidential. This request was honored almost until the conclusion of Roe's litigation. As counsel for defendants states in her letter to the Court dated June 6, 1994, defendants revealed Doe's true identity in a motion filed in the Fifth Circuit.[2]

While it is true that neither Roe nor Doe objected, any such objection would have been a vain and useless act because the Fifth Circuit had already imposed sanctions against Roe's attorney and threatened further sanctions. Moreover, for any objection to be effective Doe and Roe would have had to have acted in the same manner as they are acting here -- with advance knowledge and prior to distribution to the court. Again, given the posture of this case in the Fifth Circuit (dismissed sua sponte as moot without Roe being afforded the opportunity to brief the mootness issue, after denial of petitions for rehearing and rehearing en banc, and after imposition of sanctions), objection would have been futile and have resulted in further sanctions as promised.

Even if Roe's failure to object might constitute a waiver, Doe was under no obligation to object in a case in which he was not a party. Doe's identity was and is totally irrelevant, immaterial

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[2] In that document, defendants mysteriously said "appellees can now reveal" Doe's true identity. This clearly willful reference suggests that at some time defendants believed Doe's true identity could not be revealed. The change in circumstances is unknown. Doe's case was dismissed more than one year prior to defendants' disclosure of Doe's true identity.

and impertinent to the merits of Roe's Petition for Certiorari.[3] Doe therefore requests that this court not only strike the papers defendants have filed in this court, but that all references to John Doe's true identity which may appear anywhere in the entire record also be ordered stricken or redacted.[4] While it may be

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[3] Defendants' counsel suggests in her June 6, 1994 letter that Doe's identity is relevant to the issue of sanctions imposed against Roe's attorney. This is true only to the extent the Fifth Circuit's decision to impose attorney's fees may have been based on improper consideration of Doe's true identity. Defendants should not be permitted, however, to argue that citation of irrelevant facts magically renders those facts relevant. The fact that defendants might reveal, for example, that Superman is really Clark Kent in no way makes Superman/Clark Kent relevant to this case. If the Fifth Circuit considered such information, their actions would be improper because they considered irrelevant material regardless of the nature of that irrelevant material.

Here, there is no evidence to suggest that the Fifth Circuit considered Doe's true identity except its presence in the record (notwithstanding that defendants obviously wanted the fact considered). Indeed, the record demonstrates substantial hostility toward Roe and his attorney long before defendants revealed John Doe's true identity. If the only basis for overturning the attorneys' fee award is improper consideration by the Fifth Circuit of John Doe's true identity, Richard Roe has an extremely weak argument.

The impropriety of the Fifth Circuit's award of attorneys' fees, however, is more a function of an improper decision on the merits than consideration of irrelevant material. If Roe prevails on any of the arguments raised in his Petition for Certiorari, the attorneys' fee award will necessarily be vacated.

To the extent John Doe's true identity has any relevance to the attorneys fee award, Roe's attorney (against whom attorneys fees were personally assessed) hereby stipulates that if John Doe's identity is found otherwise irrelevant, he will waive his argument that the attorneys fee award should be reversed because defendants revealed and the Fifth Circuit improperly considered John Doe's true identity. Thus, the issue which would give any theoretical relevance to John Doe's true identity is now moot.

[4] There is one additional reference to John Doe's true identity in the trial court record which should be corrected. Doe's identity was mentioned tangentially in an exhibit filed for a different purpose. Defendants' attorney at that time, Dale Wilks, apologized for the inadvertent reference and offered to take any corrective action Doe desired. It was decided at that time

impossible to undo the damage defendants have done to date, an improper disclosure in the Fifth Circuit should not be used to justify a later improper and irrelevant disclosure in the Supreme Court. While only a limited number of people (presumably) are aware of Doe's true identity, many more will become aware of his true identity if disclosures are not stopped and prior disclosures sealed or redacted. If certiorari is granted in this case, it will be virtually impossible to undo defendants' wrong.

Unless and until defendants can establish the relevance, materiality, and pertinence of John Doe's true identity, the papers they have filed in this court should be placed under absolute seal and not subject to review by anyone. If the court agrees that Doe's true identity is irrelevant, Roe and Doe request that defendants' documents be stricken and defendants prohibited from implicitly or explicitly revealing John Doe's true identity. All references in the trial court and the Fifth Circuit record should also be ordered redacted. Roe does not object to defendants being afforded a reasonable amount of time to refile their Brief in Opposition and supporting documents after complying with the terms to be set by the court. If the court rules that Doe's true

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that more harm would be done by calling attention to the matter.

identity is relevant, Doe asks that all papers filed in this court which refer to John Doe's true identity be filed under seal and that all references in he record be sealed.

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New Orleans, Louisiana 70130
Telephone: (504) 529-7666

Attorney for Plaintiff/Petitioner
Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served on counsel of record for all parties by deposit of a copy with the United States Postal Service, postage prepaid and properly addressed at New Orleans, Louisiana on this 7th day of June, 1994.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

No. 93-1878

JUN 24 PAGE 4

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ROE

PETITIONER

V.

LOUISIANA SUPREME COURT, ET AL

RESPONDENT

RECEIVED
JUN 13 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION TO INTERVENE;
JOINT MOTION FOR PROTECTIVE ORDER;
AND JOINT MOTION TO SHOW CAUSE

Now into court, through undersigned counsel, comes John Doe, who moves to intervene in this case solely for the purpose of keeping his true identity confidential as set forth in this document.

John Doe, joined by Petitioner Richard Roe, moves for a protective order to immediately place Defendants/Respondents' Brief in Opposition and Supporting Documents under seal and further moves that Defendants/Respondents be required to show cause why their documents should not be stricken. The documents at issue improperly reveal the true identity of John Doe who is not a party to this action, whose identity is irrelevant to the subject matter of Roe's petition, and whose identity was revealed to defendants in confidence. Defendants have now willfully and maliciously violated that confidence in an effort to gain advantage in a related case.

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Roe and Doe submit that Doe's true identity is irrelevant, immaterial and impertinent to the instant litigation. It is also constitutionally protected from disclosure.

This case involves First Amendment challenges by Richard Roe to the constitutionality of defendants' practices of requiring/requesting attorney applicants to utter a religious oath (so help me God) during admissions ceremonies and placing religious references (in the year of our Lord) on law licenses. Intervenor John Doe filed a substantially identical suit against the same defendants in 1991. See Doe v. Louisiana Supreme Court, et al, No. 91-1635 (E.D.La.). Before filing this suit, Petitioner Roe had first attempted to become a plaintiff in the Doe case. The trial court denied Doe's motion for leave to name a new plaintiff and Roe initiated this action. Shortly thereafter, in late 1992, Doe voluntarily dismissed his case.

Like Richard Roe in this case, when John Doe filed suit, he also filed a motion for protective order seeking leave of court to proceed anonymously. While defendants opposed the motion for protective order in the Doe case, the voluntary dismissal occurred before there was any ruling on the motion. It is Doe's position that by electing to voluntarily dismiss his suit, the legal controversy between he and the defendants terminated and he was no longer even arguably compelled by FRCP 10(a) to reveal his name. Doe has never given defendants permission to publicly reveal his identity, which necessarily constitutes revealing certain aspects of Doe's religious beliefs or non-beliefs. While the voluntary

dismissal meant there was no order either granting or denying Doe's motion to proceed anonymously, the absence of an order granting Doe's request is not equivalent to a denial nor is it grounds for defendants to publicly disclose Doe's identity which would not have been allowable even if Doe's motion had been denied. If Doe's motion to proceed anonymously had been denied, he would have had two options: reveal his true identity or face involuntary dismissal. Had Doe's motion been granted, defendants could not have revealed Doe's identity except under conditions set by the trial court or with Doe's permission. Because Doe elected to voluntarily dismiss his suit, the issue was never decided. This fact, however, does not grant defendants power reveal Doe's identity after the suit was dismissed. To allow such a tactic would be to deprive Doe and other plaintiffs of any effective right to even request to proceed anonymously; if their request were denied the "choice" between identifying themselves or terminating litigation is non-existent. The plaintiff who decides to forego litigation will nevertheless be subject to defendants' whim and caprice in deciding whether or not to reveal the plaintiff's name. While Doe did not voluntarily dismiss his case under threat of being identified, he believed the dismissal would render his true identity legally irrelevant. He also believed defendants would keep his true identity confidential.

Any other conclusion than that confidentiality must be maintained in circumstances such as these would require a wasting of judicial and party resources. Will a plaintiff who wishes to

voluntarily dismiss be required to litigate the anonymity question before dismissal to protect confidentiality? Will a plaintiff who voluntarily dismisses have to file a post-dismissal motion to ensure confidentiality? With the requirement of FRCP 10(a) mooted by dismissal, why would a court not order confidentiality? And why would a defendant who is no longer being sued want to make the matter public? This case presents one improper reason which should not be tolerated by this Court.

Defendants' decision to reveal Doe's true identity is seemingly intended only to prejudice Roe's case and to cause harm to Doe. The relevance of Doe's true identity to the Roe case is non-existent. It is true that the Roe and Doe cases are substantially similar in the underlying legal issues presented and that Roe and Doe are/were represented by the same attorney. While these facts provide an interesting historical perspective, they do not contribute to the resolution of the legal issues in Roe's Petition for Certiorari. Revealing the true identity of John Doe does not even contribute historic perspective. It is utterly irrelevant, impertinent and immaterial.

Anticipating that defendants will argue that it is necessary for them to reveal Doe's true identity to establish its relevance, Roe and Doe ask that defendants be first required to demonstrate exactly how and why the true identity of a plaintiff in a factually similar but completely independent case which was voluntarily dismissed in 1992 could ever be relevant. Doe is not a party to this action. If defendants meet this initial burden, Roe and Doe

would further request that resolution of the issues relating to Doe's identity be determined by a person who will have no participation in determining the merits of Roe's Petition for Certiorari. Once Doe's identity is revealed, the prejudicial effect on Roe and Doe will be impossible to undo.

Revealing Doe's true identity is also a constitutional deprivation because defendants have necessarily revealed Doe's religious beliefs by connecting the specific allegations in Doe's original complaint (his religious beliefs or non-beliefs) with a specific person (his true identity). While some judges and justices and others may respect Doe's "different" religious views and the private nature of those views, see, e.g., Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) ("religion is perhaps the quintessentially private matter"), other persons may not (apparently including defendants and/or their attorneys). The point, however, is that it is none of anyone's business that Doe even has different views or what those different views may be! No matter how the state learns of a person's religious views, it can never reveal those views without a compelling interest and even then, only the least restrictive disclosure is permissible. In Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Supreme Court established a two-prong test, holding that before an individual's rights may be infringed, it must be demonstrated that there is a "compelling state interest" which justifies the infringement and "that no alternative forms of regulation would [achieve the compelling state objective] without infringing First

Amendment rights." 374 U.S. at 406-07, 83 S.Ct. at 1795-96. The fact that the state knows Doe's true identity does not render disclosure of that information constitutionally permissible.[1]

Defendants obtained knowledge of Doe's true identity because Doe had initially sought to resolve his dispute informally without resort to the courts. Once suit was filed, it was obvious that the person who had previously corresponded with defendants and John Doe were the same person. At all times, however, Doe had asked that

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[1] Because John Doe's true identity is first and foremost irrelevant, immaterial, and impertinent, detailed consideration of the constitutional arguments should be unnecessary at this time. Defendants, however, are well aware of the constitutional arguments which were raised and argued in both the Roe and Doe cases. If this court is not otherwise inclined to strike defendants' references to Doe's true identity as irrelevant, Doe would request the opportunity to fully brief the constitutional issues. The argument is essentially as follows:

To deny Doe the right to proceed anonymously and to have that anonymity maintained following conclusion of the litigation would be tantamount to compelling Doe to publicly profess and practice his religious beliefs as a condition to his being permitted access to the courts. This has been expressly prohibited by the United States Supreme Court. In Torcasco v. Watkins, 367 U.S. 438, 81 S.Ct. 1680 (1961), a man who had been appointed a Notary Public was refused his commission because he would not declare his belief in the existence of God. In finding the Maryland requirement unconstitutional, the U.S. Supreme Court said,

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

367 U.S. at 495, 81 S.Ct. at 1683-84 (emphasis added; footnotes omitted). The revelation of Doe's identity by defendants was a direct consequence of Doe having filed suit in federal court to vindicate his constitutional rights. Neither the courts nor defendants have the right to disclose or to force Doe to disclose Doe's true identity and thus Doe's religious beliefs. The mere filing of suit in federal court raised constitutional matters to which FRCP 10(a) must defer.

his identity be kept confidential. This request was honored almost until the conclusion of Roe's litigation. As counsel for defendants states in her letter to the Court dated June 6, 1994, defendants revealed Doe's true identity in a motion filed in the Fifth Circuit.[2]

While it is true that neither Roe nor Doe objected, any such objection would have been a vain and useless act because the Fifth Circuit had already imposed sanctions against Roe's attorney and threatened further sanctions. Moreover, for any objection to be effective Doe and Roe would have had to have acted in the same manner as they are acting here -- with advance knowledge and prior to distribution to the court. Again, given the posture of this case in the Fifth Circuit (dismissed sua sponte as moot without Roe being afforded the opportunity to brief the mootness issue, after denial of petitions for rehearing and rehearing en banc, and after imposition of sanctions), objection would have been futile and have resulted in further sanctions as promised.

Even if Roe's failure to object might constitute a waiver, Doe was under no obligation to object in a case in which he was not a party. Doe's identity was and is totally irrelevant, immaterial

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[2] In that document, defendants mysteriously said "appellees can now reveal" Doe's true identity. This clearly willful reference suggests that at some time defendants believed Doe's true identity could not be revealed. The change in circumstances is unknown. Doe's case was dismissed more than one year prior to defendants' disclosure of Doe's true identity.

and impertinent to the merits of Roe's Petition for Certiorari.[3] Doe therefore requests that this court not only strike the papers defendants have filed in this court, but that all references to John Doe's true identity which may appear anywhere in the entire record also be ordered stricken or redacted.[4] While it may be

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[3] Defendants' counsel suggests in her June 6, 1994 letter that Doe's identity is relevant to the issue of sanctions imposed against Roe's attorney. This is true only to the extent the Fifth Circuit's decision to impose attorney's fees may have been based on improper consideration of Doe's true identity. Defendants should not be permitted, however, to argue that citation of irrelevant facts magically renders those facts relevant. The fact that defendants might reveal, for example, that Superman is really Clark Kent in no way makes Superman/Clark Kent relevant to this case. If the Fifth Circuit considered such information, their actions would be improper because they considered irrelevant material regardless of the nature of that irrelevant material.

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